IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 431

IRVING E. MORRIS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR REHEARING FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To: The Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner Irving E. Morris, respectfully prays that this Court rehear the Petition for a Writ of Certiorari denied by the court.

Reasons Why The Petition For Rehearing Should Be Granted.

Mindful of Rule 58 of the rules of this Court limiting the grounds upon which we properly may petition the Court for rehearing, we represent to the Court that substantial grounds exist for reversal of the Court of Appeals and the Trial Court herein, not previously brought to this Court's attention.

In our Petition for Certiorari, since denied, we underscored the fact that throughout the trial, declarations of petitioner's alleged co-conspirator were erroneously admitted as to him and applied to him.

In the original Petition for Certiorari we did not allude to the error of which we now complain, *viz.*, that the *acts* of petitioner's supposed co-conspirator were permitted to be considered by the jury without a prophylactic admonition by the trial court that such acts might not bind nor affect petitioner without proof *dehors* those acts that petitioner was then (1) a member of (2) an existing conspiracy.

We now address that further complaint to the Court. If the Court will refer to the Record at pages 37-38, it will find expressed there the mistaken view, sponsored by the trial judge, that while *declarations* of alleged conspirators might not be considered against their supposed co-conspirators, *acts* could be so considered.

Complaint was made to the introduction of evidence concerning the acts of petitioner's alleged co-conspirator (R. 37). It was based upon the ground that the *acts* of that co-conspirator could not establish the existence of a conspiracy as against the petitioner who was absent when the acts were performed. The court overruled the objection (R. 38).

Both declarations *and* acts of one conspirator are uniformly held to be unavailable to establish the existence of a conspiracy as to one then absent. In *May* v. *United States*, D.C. Cir., 175 F. 2d 994, 1008-9 (1949) the court held:

> "The rules are that one defendant's connection with a conspiracy cannot be established by the acts or declarations of *other* defendants in his absence, and that a defendant cannot be bound by the acts and declarations of other defendants until (a) the conspiracy has been established and (b) the defendant's participation in the conspiracy has been established."

In *Bartlett* v. *United States*, 10 Cir. 166 F. 2d 920, 924 (1948) the court said:

> "The *existence* of a conspiracy cannot be established against an alleged conspirator by evidence of the *acts* or declarations of his alleged co-conspirator done or made in his absence." (Emphasis supplied.)

In our Petition for Certiorari we complained at some length that the instructions given by the court in the course of the trial, which supposedly limited the effect of declarations by alleged co-conspirators, were so erroneous that their effect was the reverse of that probably intended. Possibly, in denying certiorari, Your Honors have placed a construction different from ours upon the language of the trial court—perhaps even that construction suggested by the government in its answer to our petition. But what construction could be placed on the failure of the trial court to make *any* limitation upon the effect of evidence concerning acts of one alleged conspirator on another?

We respectfully submit that the government could not as to these latter matters, impose the construction on the trial court's failure to instruct properly, that the jury, without instruction, properly limited the evidence. Nor do we think such construction could be adopted by this Court.

The Court of Appeals in its opinion in this case, adopted a *tour de force* to avoid ascribing impropriety to the trial court's failure properly to limit evidence of petitioner's co-conspirators' acts. The Court of Appeals held (see Opinion, Pet. p. 39) that since a government witness had already heard petitioner utter statements pertaining to counterfeit bills, that therefore he was entitled to no instruction placing a limit upon the effect of evidence of his supposed co-conspirators' acts. But if those acts were considered by the jury as establishing the existence of a conspiracy between Morris and his supposed co-conspirator, then they were improperly considered, notwithstanding some of the evidence showed petitioner knew something about a counterfeiting transaction. His knowledge thereof, if he had such knowledge, could establish neither the existence of, nor his membership in, a counterfeiting conspiracy.

We respectfully submit to the court that what the Court of Appeals has done in so expressing itself, is to hold in effect that once a defendant has mere knowledge of the commission of a criminal offense, the acts of another render him *particeps crimini*. Criminal liability could scarcely be imposed on a more vicarious basis.

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While we address these matters to the Court as additional reasons why Certiorari ought to be granted herein, we are hopeful that should the Court grant our Petition for Rehearing, it will at least consider the possibility of reviewing the matters originally raised, owing to their close relationship to those now raised.

CONCLUSION.

For the foregoing reasons and for the reasons urged in the original Petition for Certiorari, we respectfully pray that this Court grant a rehearing and that upon such rehearing, grant our Petition for a Writ of Certiorari.

Respectfully submitted,

FRANK W. OLIVER,
Attorney for Petitioner.

CERTIFICATE OF COUNSEL.

Frank W. Oliver, attorney for petitioner herein, certifies that the within Petition for Rehearing is filed in accordance with Rule 58 of the Rules of this Court and is presented in good and earnest faith and is not for the purpose of delay; and he further certifies that the petition is restricted to a circumstance of substantial effect not previously urged in this Court.

Frank W. Oliver further certifies that he has mailed three copies of the within Petition to the Solicitor General, Department of Justice, Washington 25, D. C.; and has also mailed a copy of said Petition to the United States Attorney, United States Courthouse, Chicago, Illinois.

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Frank W. Oliver